Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1985

INTERFIRST BANK DALLAS, N.A.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA AND
THE INTERNAL REVENUE SERVICE,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Fifth Circuit err by its narrow construction of the term "levy" as used in the Wrongful Levy Statute, which construction limits the waiver of sovereign immunity provided by said statute as to certain lien creditors whose property interests are "voluntarily surrendered" by a taxpayer to the IRS?

B. Did the Fifth Circuit err in its construction of the Federal Tort Claim Act, which construction precludes the assertion of tort claims against the United States arising out of torts committed by IRS agents where the aggrieved party is not the person against whom taxes have been assessed?

C. Did the Fifth Circuit err in holding that the subject waivers of sovereign immunity found in the Wrongful Levy Statute and the Federal Tort Claim Act are rational such that the Due Process Clause is not violated?

D. Did the Fifth Circuit err in declining to construe the subject waivers of sovereign immunity broadly as required to prevent an otherwise irrational statutory classification of tort claims?

E. Did the Fifth Circuit err in declining to infer a waiver of sovereign immunity where a constitutional tort is asserted against the United States and the Internal Revenue Service?

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OPINION BELOW

The opinion of the Court of Appeals, dated August 26, 1985 is reported at 769 F.2d 299 and appears in Appendix A of this Petition. No petition for rehearing was filed.

JURISDICTION

The Order of the Court of Appeals for the Fifth Circuit was entered on August 26, 1985. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. §7426 (1982) provides in pertinent part:

> If a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on said property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the secretary or its delegate.

Section 7426 is referred to herein as the "Wrongful Levy Statute", and is further identified as Section 110(a) of the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1142.

26 U.S.C. §6331(b) (1982 & Supp. 1984) provides in pertinent part:

> The term "levy" as used in this Title includes the power of distraint and seizure by any means.

28 U.S.C. §2674 (1982), commonly referred to as the "Federal Tort Claims Act" provides in pertinent part:

> The United States shall be liable, respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .

28 U.S.C. §2680(c) (1982) provides:

> The provisions of this chapter and §1346(b) of this Title shall not apply to . . . (c) any claim arising with respect of the assesment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer or customs or excise or any other law enforcement officer.

The full text of the above statutes is set out in Appendix B of this Petition.

STATEMENT OF THE CASE

In May of 1981, to secure a $9,000,000 loan, Condor Drilling Company ("Condor") granted InterFirst Bank Dallas, N.A. (the "Bank") a security interest in equipment, drilling rigs, accounts receivable and proceeds. Such security interest was perfected by the filing of a financing statement with the Texas Secretary of State.

On January 29, 1982, the IRS served a written assessment of unpaid employment and withholding taxes upon Condor in the amount of $769,868.00. Certain directors and officers of Condor faced the spectre of individual liability for payment of said delinquent taxes.

On February 11, 1982, Condor's equipment was liquidated at auction to pay its obligations to the Bank. Immediately following the auction, however, an IRS agent served a government form entitled "Notice of Levy" on the auctioneer to compel payment of Condor's tax assessment. The auctioneer later surrendered $198,466 of auction proceeds to the IRS. The IRS agent also demanded that Condor surrender its accounts receivable, including several large receivables due from Post Petroleum that were pledged to the Bank. The IRS agent threatened to file "tax liens" if the accounts were not surrendered.

On February 26, 1982, the Bank served notice on Condor of the Bank's intention to foreclose on all collateral effective March 9, 1982, including the accounts receivable from Post Petroleum. The Bank was unaware that the IRS agent had directed the officers of Condor to deliver the receivables when collected to the IRS.

In response to the demand of the IRS agent, Condor endorsed cashier checks received from Post Petroleum over to the IRS on or about March 4, 1982. The aggregate amount transferred to the IRS was $240,000.00.

On March 9, 1982, Condor commenced Chapter 11 bankruptcy proceedings. Condor's unpaid indebtedness to the Bank exceeds the value of the Bank's collateral by more than $6,000,000.

On November 4, 1981, InterFirst brought suit in the U.S. District Court for the Northern District of Texas against the United States and the Internal Revenue Service alleging common law conversion and wrongful levy, and claiming damages of $438,466.00. $198,466.00 of the Bank's claim was attributable to proceeds of the auction sale, with the remaining $240,000.00 attributable to the proceeds of accounts receivable. The government filed a Motion to Dismiss the $240,000.00 claim alleging lack of subject matter jurisdiction by reason of sovereign immunity. The District Court severed the claim relating to the $198,466.00 of auction proceeds, as the District Court and the government acknowledged that sovereign immunity had been waived as to said claim. The District Court entered judgment in favor of the government on the accounts receivable claim finding that it lacked jurisdiction by reason of sovereign immunity.

InterFirst filed a notice of appeal. On August 26, 1985, the Fifth Circuit Court of Appeals affirmed the District Court's order of dismissal.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Northern District of Texas exercised jurisdiction over the complaint pursuant to 28 U.S.C. §1331 and §1346. The Fifth Circuit Court of Appeals exercised jurisdiction over the appeal pursuant to 28 U.S.C. §1291.

ARGUMENT

A. THE FIFTH CIRCUIT ERRED BY ITS NARROW CONSTRUCTION OF THE TERM "LEVY" AS USED IN THE WRONGFUL LEVY STATUTE, WHICH CONSTRUCTION LIMITS THE WAIVER OF SOVEREIGN IMMUNITY PROVIDED BY SAID STATUE AS TO CERTAIN LIEN CREDITORS WHOSE PROPERTY INTERESTS ARE "VOLUNTARILY SURRENDERED."

Because taxes are the lifeblood of government, Congress has created a formidible arsenal of collection tools . . . *United States v. Rodgers*, 461 U.S. 677, 683 (1983). The Internal Revenue Code provides two principal tools for that purpose, the administrative levy, 26 U.S.C. §6331 (1982 & Supp. 1984) and judicial foreclosure, 26 U.S.C. §7403. Each procedure is designed to apply to specific kinds of situations to insure that taxes are paid while respecting the rights of third-parties who may have an interest in the property.

Administrative levy under 26 U.S.C. §6331 (1982 & Supp. 1984) is the more drastic of the government's two collection procedures, *Bull v. United States*, 295 U.S., 247, 259-260 (1935). By allowing the government summarily to seize and sell "all property and rights to property . . . belonging to the delinquent taxpayer," the 26 U.S.C. §6331(a) administrative levy permits the IRS to collect unpaid taxes without judicial intervention. It is a summary non-judicial process, *United States v. Sullivan*, 333 F.2d 100, 116 (3rd Cir., 1964). It provides no notice to third parties that property in which they may have an interest has been surrendered. If an individual discovers a levy and believes that it was wrongful, his or her only recourse is to seek administrative review under 26 U.S.C. §6343(b) (1982) within nine months or file suit in federal district

court under 26 U.S.C. §7426(a)(1) (1982) within the same amount of time, *United States v. National Bank of Commerce*, 105 S. Ct. 2919, 2933 (1985), (Powell, J., dissenting).

Notwithstanding the likelihood that errors will be committed by IRS agents utilizing the administrative levy procedure (as contrasted with the §7403 judicial foreclosure which is "punctilious in protecting the vested rights of third parties caught in the Government's collection effort", *United States v. Rodgers*, 461 U.S. at 699, the Fifth Circuit limited the remedy available to lien creditors whose collateral is surrendered to IRS agents in the course of coercive tax assessment and collection procedures. The Fifth Circuit broadened the legal irresponsibility of the government to apply to the Bank's claim notwithstanding the Wrongful Levy Statute's express provision that the right of a lien creditor to bring a civil action against the United States may not be denied merely because the collateral is "surrendered."

Although the government and the Court of Appeals acknowledge that $240,000 of cashier's checks were surrendered after assessment and demand, the Fifth Circuit distinguishes between what it characterizes as "voluntary" and "involuntary" surrenders. "While a 'surrender' may be a voluntary act, it may also be compelled." 769 F.2d at 305.

> No bright line separates voluntary from involuntary actions. Instead, the two shade into one another along a spectrum. At one extreme is the "ideal type" of unconstrained, purely voluntary action. At the other is coerced action. Between is the range of partly voluntary, partly involuntary action.

769 F.2d at 305.

The Bank does not argue with the Fifth Circuit's de-

scription of the difficult and often subjective task of differentiating voluntary from involuntary acts. However, we question the validity of this test which is based on random conduct to define the circumstances in which innocent third parties not involved in the administrative levy process may sue the government. The Fifth Circuit characterizes the IRS' conduct in this case as a voluntary "pre-levy" collection procedure. By characterizing the IRS conduct as "pre-levy", the Court excludes the IRS agent's conduct from the waiver of sovereign immunity provided by the Wrongful Levy Statute, and concludes that InterFirst's claim is barred.

Other Court of Appeals have articulated varied formulations of the acts which precede and constitute "levy." In *American Acceptance Corp. v. Glendora Better Builders, Inc.*, 550 F.2d 1220, 1223 (9th Cir. 1977) the Ninth Circuit held the prerequisites to "levy" are assessment, notice and demand to pay the tax, and failure to pay the tax within the ten days after notice and demand. In *In re Carlson*, 580 F.2d 1365 (10th Cir. 1978), the Tenth Circuit states that a "levy" under §6331 does not require prior judgment, but, rather all that is required is assessment. In *United States v. O'Dell*, 160 F.2d 304, 307 (6th Cir. 1947) the Sixth Circuit notes: A "levy" requires that property be brought into legal custody through seizure, actual or constructive, levy being an absolute appropriation in law of the property levied upon and mere notice is insufficient.

Asserting a wrongful levy claim in the District Court, the Bank sought to have its day in Court to prove the following facts:

> (a) The IRS agent served a formal written assessment and demand for payment of taxes upon Condor;

(b) The IRS agent directed that specific property (i.e., the Post Petroleum accounts receivable) be surrendered to the IRS;

(c) That pursuant to said demand and in response to other threats, Condor surrendered $240,000.00 of receivables to the IRS by means of endorsement of a cashier's check received from Post Petroleum; and

(d) Said receivables were subject to the Bank's prior and senior lien.

Said conduct falls within the ambit of the Wrongful Levy Statute. A "levy" in this context means the "imposition or collection of an assessment." See for example, "levy" as defined in Webster's New Collegiate Dictionary (G&C Merrin Co., 1981). The Bank's claim for wrongful levy should not depend upon whether the IRS chooses to "[hold] the taxpayer's arm behind his back or [hold] a gun to his head", 769 F.2d at 305-306. The Fifth Circuit's erroneous construction of the term "levy" may well enlarge the government's formidable arsenal of collection tools, but ignores the rights of innocent third parties entangled in the collection process.

B. THE FIFTH CIRCUIT ERRED IN ITS CONSTRUCTION OF THE FEDERAL TORT CLAIMS ACT, WHICH CONSTRUCTION PRECLUDES THE ASSERTION OF TORT CLAIMS AGAINST THE UNITED STATES ARISING OUT OF TORTS COMMITTED BY IRS AGENTS WHERE THE AGGRIEVED PARTY IS NOT THE PERSON AGAINST WHOM THE TAXES HAVE BEEN ASSESSED AND WHO LACKS AN OTHERWISE ADEQUATE REMEDY.

In the alternative, the Bank asserts that its conversion claim against the United States may be brought under the

Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2674 (1982), which waives the federal government's liability in tort. The Fifth Circuit held that a "formidable obstacle" namely 28 U.S.C. §2680(c) (1982) precludes the Bank's lawsuit by reason of its limitation of the sovereign immunity waiver as to: "Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer."

However, a careful examination of the legislative history behind Section 2680(c) indicates that Congress' intent was to bar only those suits involving the assessment or collection of taxes for which other adequate remedies were available. In *Kosak v. United States*, 465 U.S. 848, 104 S. Ct. 1519, 1526 n. 17 (1984), Justice Marshall, announcing the Court's opinion, summarizes the legislative history of 2860(c):

> To our knowledge, the only arguably relevant specific statement as to the purpose of §2680(c) appears in the testimony of Alexander Holtzoff before a Subcommittee of the Senate Judiciary Committee. Holtzoff emphasized the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes; he did not proffer an explanation for the portion of the provision pertaining to the detention of goods.

The legislative history by implication reveals that tort claimants in the tax "collection and assessment" context for whom Congress had not provided an adequate, subsisting remedy were not intended to be excluded from the Federal Tort Claims Act. The language in §2680(c) precluding suits arising in respect of the "assessment or collection of any tax" is identical to that of 26 U.S.C. §7421(a), which prohibits any suit for the purpose of res-

training the "assessment or collection of any tax", *Capozzoli v. Tracey*, 663 F.2d 654, 657 (5th Cir. 1981).

In *South Carolina v. Regan*, 465 U.S. 367, 104 S. Ct. 1107 (1984) this Court considered the government's familiar argument that the Plaintiff's suit was barred under the identical "assessment and collection" language of 26 U.S.C. §7421(a). Justice Brennan, who delivered the opinion of the Court, concluded:

> [T]he Act was intended to apply only when Congress has provided an alternate avenue for an aggrieved party to litigate its claims on its own behalf. Because Congress did not prescribe an alternate remedy for the plaintiff in this case, the Act does not bar this suit.

Regan at 1106.

Thus, if this Court were to concur with the Fifth Circuit that there exists a post-assessment "pre-levy" collection process that is outside the scope of the Wrongful Levy Statute, the Bank has no other adequate remedy. Therefore, the Bank should not be excluded from the coverage of the Federal Tort Claims Act by reason of §2680(c).

The Fifth Circuit cites *Kosak* for the proposition that §2680(c) may be interpreted in a manner that leaves persons without an "effectual remedy." However, *Kosak* asserted a tort claim arising out of actions by the U.S. Customs Service. The legislative history cited in *Kosak* noting the "adequacy of existing remedies" was the sole justification for the §2680(c) claim limitation refers only to torts arising out of improperly collected taxes as distinguished from claims arising from detention of goods by the Customs Service. Therefore, the Fifth Circuit's reliance on *Kosak* was misplaced.

The Fifth Circuit's holding on this important question of federal law confines the waiver of sovereign

immunity granted by the Federal Tort Claims Act, and may have an unintended impact limiting the liability of IRS agents when exercising their arsenal of collection tools. Conceivably, the opinion below could be interpreted as giving the IRS immunity to commit a myriad of torts including assault, gross negligence and conversion against innocent third parties, so long as the IRS agent is pursuing the "assessment or collection of any tax" at the time the tort is committed. Review on writ of certiorari is therefore appropriate with respect to the Fifth Circuit's interpretation of the Federal Tort Claims Act.

C. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE WAIVERS OF SOVEREIGN IMMUNITY FOUND IN THE WRONGFUL LEVY STATUTE AND THE FEDERAL TORT CLAIM ACT ARE RATIONAL SUCH THAT THE DUE PROCESS CLAUSE IS NOT VIOLATED.

Prior to the surrender of the cashier's checks by the taxpayer to the Internal Revenue Service, the Bank held a senior perfected security interest in the Post Petroleum receivables which was superior to any claim of the IRS as recognized in *Slodov v. United States*, 436 U.S. 238, 256-58 (1978). A security interest or mortgage is a property interest protected by the Fifth Amendment, *Lewisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). Had Congress, when it enacted the Tax Lien Act of 1966 and Wrongful Levy Statute therein, implemented rational classifications of creditor tort claims, the Bank would have had its day in court to prove a conversion claim against the United States.

Statutes which are "clearly arbitrary and unreasonable, having no substantial relation to the public health,

safety, morals or general welfare" violate the Fifth Amendment's Due Process Clause, *Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 395, (1926). As was noted in *Koch v. Yunich*, 553 F.2d 80, 84 (2nd Cir., 1976), "[t]he substantive due process test applicable since the 1930's in the area of social and economic legislation is whether the challenged law has a rational relation to a valid state objective. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955)..." The term "rational" includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class, *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens J., concurring).

It was pointed out in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) that "[s]ubstantive due process has at times been a treacherous field for this Court." However, as was subseqently stated by the Court, "... history counsels caution and constraint. But it does not counsel abandonment." 431 U.S. at 502. In *Moore*, the Court struck down an ordinance which defined "family" and fixed certain "family rights" at the arbitrary boundary of the nuclear family. The Wrongful Levy Statute cuts off third-party creditors' rights in assets of a taxayer at an arbitrary boundary determined solely by the extent to which the taxpayer's surrender of assets is determined to be "involuntary."

The Fifth Circuit summarily disposed of the Bank's substantive due process claim by finding that the statutory scheme at issue is rational. The Court states: "Even if we have the power to review the rationality of congressional waivers of sovereign immunity and expand those waivers in order to make them rational, we find that the

waivers in question are rational." 769 F.2d at 310. Ironically, having found that the waivers of sovereign immunity were rational, the Fifth Circuit concludes: "The doctrine is often harsh and makes little sense in cases like the one before us here." 769 F.2d 310. We submit that the particular statutory waivers under consideration make "little sense" and that the Fifth Circuit erred in failing to declare the waivers irrational.

At best, the tort classification scheme embodied in the Wrongful Levy Statute and approved by the Fifth Circuit is random and haphazard. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) this Court condemned as unconstitutional "a system or procedure that deprives persons of their claims in a random manner." The potential for arbitrary result is demonstrated by the "spectrum of voluntary/involuntary action" analysis adopted by the Fifth Circuit. Under the Court's analysis, the right of a lien creditor to bring suit against the government (notwithstanding the merits of the case) depends upon random conduct on the part of a taxpayer and his or her Internal Revenue Service agent. In some instances, personal contact by the IRS agent with the taxpayer, coupled with written demands and threats of tax levies may be sufficient psychological inducement to frighten the taxpayer into a "voluntary" surrender of collateral to the IRS. In other cases, the IRS may be required to "hold the taxpayer's arm behind his back or hold a gun to his head" to compel surrender of the collateral. In yet other cases, the threat of "trust fund" withholding tax liability upon officers and directors of the taxpayer and collusion with the IRS agent may result in a surrender of the lien creditor's collateral to the IRS. Yet should such random events define the rights of lien creditors to bring suit?

The irrationality of the tort classification scheme in the Wrongful Levy Statute is further demonstrated by examining the extent to which it fails to fulfill Congress' objective in enacting the statute. In order to pass due process scrutiny, the means selected by Congress to achieve its end should have a real and substantial relation to the permissible legislative objective sought to be obtained, *Schweiker v. Wilson*, 450 U.S. 221 (1981). Classifying taxpayer tort claims according to the level of voluntariness involved in the taxpayer's actions may be rational for some legislative purposes. However, it is difficult to grasp the rationality of such a classification scheme applied to tort claims of third party lien creditors whose status under the Uniform Commercial Code is not determined by whether the taxpayer surrenders assets to the IRS voluntarily or otherwise. As a practical matter, the creditor has no notice of the IRS' collection tactics and little control over whether the taxpayer is in a cooperative psychological mood.

The best expression of the legislative objectives behind the Wrongful Levy Statute is contained in the following passage:

> Present law is quite limited in the extent to which it takes into account the rights of third parties in the procedures set out in the tax laws for the collection of taxes from a taxpayer. Under present law, for example, the United States cannot be sued by third persons where its collection activities interfere with their property rights.
>
> . . .
>
> Your committee believes where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court.

S. Rep. No. 1708, 89th Cong., 2d Sess, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3722, 3750.

At least one court has plainly stated that the tort claim classification arising under the Wrongful Levy Statute fails to achieve the legislative objective sought to be obtained. In *Standard Acceptance Co. v. United States*, 342 F. Supp. 45, 48 (N.D. Ill., 1972), the District Court construes the Wrongful Levy Statute in a fashion similar to that of the Fifth Circuit, but finds:

> Unfortunately, the result here appears to be out of keeping with the general legislative intent of Congress . . . The Federal Tax Lien Act of 1966 was intended to conform the lien provisions of the internal revenue laws to the concepts developed in the Uniform Commercial Code. S. Rep. No. 1708, 1966 U.S. Code Cong. & Ad. News, 3722, 3750-51. That has not been achieved here . . .

Under the Fifth Circuit's construction, the Wrongful Levy Statute fails to have any substantial relation with Congress announced intention to coordinate the Internal Revenue Code with the Uniform Commercial Code. The Uniform Commercial Code adopts a set of rules and principles (i.e., holder in due course, bona fide purchaser for value) developed by the common law which specify the circumstances under which a creditor, including the IRS, may acquire property from a taxpayer-debtor free and clear of the claims of lien creditors. The Wrongful Levy Statute, as construed by the Court below ignores the reasonable expectations of Uniform Commercial Code lien creditors and makes such creditors' claims contingent upon a subjective, uncertain and unpredictable analysis of the voluntariness of a taxpayer's surrender of assets. Such analysis is in direct conflict with the often repeated purpose of the Uniform Commercial Code to bring order and

certainty to commercial transactions.

No lawmaker with the intention announced in the legislative history of the Wrongful Levy Statute could logically believe that Uniform Commercial Code concepts which protect and prioritize the respective rights of lien creditors should be disregarded, and that Congress should instead implement in federal tax collection cases a "spectrum of voluntary/involuntary action" analysis to define those cases wherein the third party creditors may bring suit. The Fifth Circuit erred in finding the tort classifications arising under the Wrongful Levy Statute and Federal Tort Claim Act as applied are rational under the Due Process Clause.

D. THE FIFTH CIRCUIT ERRED IN DECLINING TO CONSTRUE THE SUBJECT WAIVERS OF SOVEREIGN IMMUNITY BROADLY AS REQUIRED TO PREVENT AN OTHERWISE IRRATIONAL STATUTORY CLASSIFICATION OF TORT CLAIMS.

The irrational classification of creditor tort claims arising from the subject statutes brings into view conflicting canons of statutory construction. On the one hand, "waivers of sovereign immunity are to be strictly construed" *Soriano v. United States*, 352 U.S. 270, 276 (1957). On the other hand, the Court has espoused the principal that a federal court should not and will not reach a constitutional question if it could rest its decision on non-constitutional grounds, *Gulf Oil Company v. Bernard*, 452 U.S. 89, 99 (1981).

Given the irrational characteristics of the Wrongful Levy Statute and the Federal Tort Claims Act as applied by the Fifth Circuit below, the constitutionality of said statutes appears doubtful under due process scrutiny. The

question then presented is: Should the federal courts liberally interpret waivers of sovereign immunity to avoid constitutional issues, or should the rule of strict construction of sovereign immunity control?

The Fifth Circuit indicates:

> Interfirst cites no cases, nor are we aware of any, where a congressional waiver of sovereign immunity has been held to be irrational and, on that basis, has been broadened. We note that such a result would be in tension, if not in direct conflict, with the fundamental principle that waivers of sovereign immunity must be expressly stated by Congress and should not be inferred.

769 F.2d at 309-10.

A troubling aspect of the Fifth Circuit's analysis is that it suggests where the doctrines of sovereign immunity and substantive due process conflict, that sovereign immunity prevails. This appears to be inconsistent with statements in *Nevada v. Hall*, 440 U.S. 410, 428 (1979), and *Edelman v. Jordan*, 415 U.S. 651, 687 (1974), wherein members of the Court have acknowledged that sovereign immunity is not constitutionally compelled. A moment's reflection on the Fifth Circuit's holding reveals a further tension between the doctrine of sovereign immunity and the doctrine of judicial review, which proclaims the authority of the federal courts to determine the legality of governmental actions.

Where an irrational waiver of sovereign immunity fails to meet due process requirements, the federal courts should adopt a rule of statutory construction which enlarges the waiver of sovereign immunity to avoid an otherwise unconstitutional interpretation, unless such construction is clearly inconsistent with the Congressional intent. The legislative history to the Wrongful Levy

Statute does not indicate an unequivocal Congressional intent to deny a lien creditor such as the Bank its day in Court against the United States on its tort claim. Therefore, since the Fifth Circuit adopts a rule of narrow construction of waivers of sovereign immunity notwithstanding conflicting constitutional concerns, namely, Fifth Amendment due process concerns, review by writ of certiorari is appropriate.

E. THE FIFTH CIRCUIT ERRED IN DECLINING TO INFER A WAIVER OF SOVEREIGN IMMUNITY WHERE A CONSTITUTIONAL TORT IS ASSERTED AGAINST THE UNITED STATES AND THE INTERNAL REVENUE SERVICE.

By reason of the irrational tort classification scheme approved by the Fifth Circuit, the Bank's right to due process and to freedom from arbitrary and capricious governmental action has been violated. This Court has held the Due Process Clause restricts a sovereign's power to limit governmental tort liability in a manner that is not arbitrary or capricious, *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980). The question now presented is whether the federal courts are powerless to adjudicate claims against the United States and the Internal Revenue Service arising directly under the Due Process Clause of the Constitution. Under the Constitution, the federal court's remedial powers are based on the terse language of Article III of the Constitution:

> Judicial power shall extend to all cases . . . arising under this Constitution . . ."

Scholars and jurists have long debated the reach of the phrase judicial power. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) this Court looked to the Constitution and not to

Congress for its remedial power, and held that a federal agent who had violated the command of the Fourth Amendment could be held liable in damages despite the absence of a federal statute authorizing such a remedy. In *Passman v. Davis*, 442 U.S. 228 (1979), this Court held that constitutional rights are ultimately to be enforced by the courts and that damages have been regarded as the ordinary remedy for the invasion of personal interests and liberty. For parties in the Bank's shoes "it is damages or nothing." *Bivens*, 403 U.S. at 410.

The Fifth Circuit erred in failing to exercise the broad subject matter jurisdiction arising under Article III, Section II of the Constitution, that the judicial power shall extend to all cases, in law and equity, arising under the Constitution, laws of the United States and treaties made. Relying on earlier Fifth Circuit precedent, the Court of Appeals held "[t]he Constitution does not waive the government's sovereign immunity in a suit for damages . . . [s]uit[s] for damages against the United States based on the Constitution [are] not contemplated by *Bivens* and its progeny." 679 F.2d at 309. The Fifth Circuit's reliance on sovereign immunity was misplaced.

Justice Brennan noted in *Owen v. Independence*, 445 U.S. 622, 645 (1980): It has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy. The contours of the American doctrine of sovereign immunity were defined in a series of Supreme Court decisions soon after the adoption of the U.S. Constitution. The question of whether a sovereign state was amenable to an unconsented suit in federal court became one of the first important questions decided by the Supreme Court. In *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) four of the five justices held that the exercise of Article III power over controversies between one

state and the citizens of another state did not require the consent of the defendant state. The opinions of the individual justices provide an informative insight into the nature of the controversy over sovereign immunity in that period in American history. Justice Wilson rejected the doctrine as totally inapplicable. Two justices considered whether the Court's holding as to the states also applies against the United States — whether under the Constitution, the United States could hold itself immune to the exercise of the judicial power created by the Constitution. Justice Cushing explored the possibility that his reasoning might permit unconsented suits against the United States. He doubted if this conclusion necessarily followed, but did not shy from this implication: "If this be a necessary consequence, it must be so." *Chisolm*, supra at 469 (1793). Chief Justice Jay considered the conclusion that the United States could be sued without its consent "fair reasoning." The Chief Justice did not decide the question but expressed the wish that "the state of society was so far improved and government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice and be sued by individual citizens." *Chisolm* at 479.

In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) Justice Story developed a line of reasoning which would have allowed federal court jurisdiction over some claims against the United States. He observed that the Constitution extends the federal judicial power to "all cases" arising under the Constitution, laws, and decrees of the United States but contains less than inclusive language in granting jurisdiction over "controversies . . . to which the United States shall be a party." Justice Story reasoned that the Constitution should be interpreted to give the Supreme Court limitless federal question jurisdic-

tion over constitutional claims, implicitly including where the United States is a party defendant. He recommended a "different policy" in cases in which the United States is a party but no federal question raised.

Justice Story's carefully drawn distinction was the seed of a federal doctrine of sovereign immunity which would have permitted unconsented suits to enforce constitutional violations on the part of the federal government while subjecting ordinary tort and contract claims to the requirements of sovereign consent. This seed, however, was never nurtured. In *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 411-12 (1821), the case in which the Court held that the 11th Amendment does not bar the Supreme Court from exercising appellate jurisdiction over cases arising under the Constitution, Chief Justice Marshall issued his famous dictum that "the universally received opinion is, that no suit can be commenced or prosecuted against the United States, that the Judiciary Act does not authorize such suits." The distinction that Justice Story drew in *Martin v. Hunter's Lessee* was forgotten. Sovereign immunity was firmly established as an American legal doctrine without ever having been subjected to serious scrutiny for the purposes of determining its appropriate scope. If the adoption of sovereign immunity by *Cohens v. Virginia* and its progeny bar a constitutional tort claim for damages, as held by the Fifth Circuit, the principal of *stare decisis* does not prevent the federal courts from abandoning one of their "illegitimate jurisprudential offspring," *Spencer v. General Hospital of the District of Columbia*, 425 F.2d 479, 484 (D.C. Cir. 1969).

The Fifth Circuit, while appreciative of the Bank's arguments regarding sovereign immunity, indicated that they were "addressed to the wrong audience." Instead of exercising jurisdiction over unconstitutional conduct, the

Court declared: "ours is not to reason why, ours but to do or die." 769 F.2d 310.

Sovereign immunity has been recognized as an anachronistic and unnecessary remnant of a feudal legal system, see e.g., *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 57 (1944); (Frankfurter, J. dissenting); *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961). The Fifth Circuit's unwillingness to consider the assertion of a constitutional tort against the United States and the Internal Revenue Service provides this Court with an opportunity to determine the scope of sovereign immunity where it conflicts with the constitutional values embodied in the Due Process Clause.

CONCLUSION

The Fifth Circuit in its opinion below decided important questions of federal law which have not been, but should be settled by this Court. The Court of Appeals erred in its construction of the Wrongful Levy Statute and Federal Tort Claims Act, and by its refusal to apply the Due Process Clause, and therefore, deprived InterFirst of its day in court. For the reasons stated herein, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

INTERFIRST BANK DALLAS, N.A.,
Plaintiff-Appellant,

v.

UNITED STATES of America, and
Internal Revenue Service,
Defendants-Appellees.

Nos. 84-1412, 84-1571.

United States Court of Appeals,
Fifth Circuit.

Aug. 26, 1985.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, POLITZ and WILLIAMS, Circuit Judges.

This case requires us to apply the hoary and oft-criticized doctrine of sovereign immunity. On November 4, 1982, Interfirst Bank Dallas filed suit against the United States and the Internal Revenue Service alleging that the IRS, in collecting delinquent taxes from the Condor Drilling Company, wrongfully levied upon property in which Interfirst had a perfected security interest. After severing part of Interfirst's claim, the district court dismissed the remaining portion of the claim on the ground that sovereign immunity applied. Because we agree that the government is immune from suit, we affirm.

I

[1] On April 8, 1981, Interfirst Bank Dallas entered into an agreement with the Condor Holding Company and its wholly owned subsidiaries ("the Condor Group") under

which Interfirst agreed to loan the Condor Group $9,000,000. The loan was secured, in part, by the equipment, drilling rigs, and accounts receivable of the Condor Drilling Company ("Condor"), a member of the Condor Group engaged in the oil and gas drilling business. Interfirst claims that this security interest was perfected by the filing of financing statements with the Texas Secretary of State on April 13, 1981.[1]

In December 1981, the Condor Group defaulted on its initial installment payment to Interfirst of principal and interest. Interfirst gave notice of default on January 29, 1982. By coincidence, on the same day the IRS assessed unpaid employment and withholding taxes against the Condor Drilling Company in the amount of $769,868. According to Interfirst, certain directors and officers of Condor faced the spectre of individual liability for the delinquent taxes, pursuant to 26 U.S.C. § 6672 (1982).

On February 11, 1982, Condor's drilling equipment was liquidated at auction to pay its obligations to Interfirst. Immediately following the auction, however, the IRS served a "Notice of Levy" on the auctioneers to compel payment of Condor's tax assessment, and the auctioneers later surrendered the auction proceeds to the IRS. The IRS also requested that Condor surrender its accounts receivable, including several receivables due from Post Petroleum worth $240,000 and threatened to file a tax lien if the accounts were not surrendered. In response to this request, Condor paid the proceeds of the Post Petroleum receivables to the IRS by endorsing over three cashier's checks from Post; $70,000 was surrendered on March 1, 1982, and $170,000 on March 4.

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[1] For the purpose of reviewing the government's motion to dismiss, we take as true the facts alleged by Interfirst in its pleadings.

In the meantime, Interfirst was blisfully unaware of the IRS's collection activities. On February 26, 1982, the Bank served notice on Condor of its intention to foreclose on all collateral, including Condor's accounts receivable from Post Petroleum. The notice indicated that foreclosure was to occur on March 9, 1982. Despite this notice, Condor failed to inform Interfirst that it was surrendering its Post accounts receivable to the IRS and Interfirst did not consent to this transfer.

On March 9, 1982, Condor commenced Chapter 11 bankruptcy proceedings. Interfirst alleges that its claims against Condor exceed the value of Condor's collateral by more than $6,000,000, and that this deficiency remains unpaid.

[2] Interfirst brought suit against the government on November 4, 1982, alleging common law conversion and wrongful levy, 26 U.S.C. § 7426, and claiming damages of $438,466. $198,466 of Interfirst's claim was for the proceeds of the auction of Condor's drilling equipment; the remaining $240,000 was for the accounts receivable from Post Petroleum. In a memorandum opinion, the district court granted the government's motion to dismiss the claims relating to the accounts receivable on the grounds of sovereign immunity. After severing the claim relating to the auction proceeds,[2] the court entered final judgment in favor of the government on the accounts receivable claim. In these consolidated appeals, Interfirst challenges both the district court's non-final order dismissing the accounts receivable claim as well as the resulting final judgment on that claim.[3]

[2] As a result of the severance, Interfirst's auction proceeds claim, which was subsequently settled, is not before us.

[3] Interfirst Appealed from the district court's memorandum opinion granting the government's motion to dismiss because it was unsure

II

[3] Decried as irrational and immoral by some, *see, e.g.*, *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) ("an anachronism without rational basis that has existed only by virtue of inertia"), criticized on historical grounds by others, *see* Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 2-4 (1924), recognized by all to have little doctrinal coherence, the doctrine of sovereign immunity has nonetheless retained the endorsement of the two institutions that matter — the Supreme Court and Congress. The origins of the doctrine in English law are obscure,[4] and its importation to the United States unreasoned.[5] Borchard, *supra*, at 4. However, since its adoption in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12, 5 L.Ed. 257 (1821), and *Hill v. United States*, 50 U.S. (9 How.) 386, 389, 13 L.Ed. 185 (1850),

whether this opinion might be deemed a "final order." This appeal was assigned case No. 84-1412. After the district court entered its final judgment, Interfirst filed a second notice of appeal, which was given case No. 84-1571. These appeals have been consolidated because they involve identical parties and issues. Because the first appeal, No. 84-1412, was from an interlocutory order, we dismiss that appeal, *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers*, 757 F.2d 676, 685 (5th Cir. 1985); 28 U.S.C. § 1291 (1982), and consider only the second appeal, No. 84-1571.

[4] Apparently, the doctrine grew out of a perversion of Bracton's maxim, "the King can do no wrong." Originally, this expression meant merely that the King was not privileged to do wrong. Borchard, *supra*, at 2 n. 2. However, it eventually came to mean that the King was incapable of doing wrong. *Id.* This is perhaps one illustration of the fact that, often, the life of the law has been neither logic nor experience (Justice Holmes notwithstanding); it has been language. Like the monster of Dr. Frankenstein, language can escape the intent of its creators and have a force of its own.

[5] The doctrine first received expression in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), where Chief Justice Marshall, without offering authority or explanation, stated in dictum that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id.* at 411-12.

the doctrine, though occasionally criticized,[6] has been repeatedly upheld by the Supreme Court,[7] and though limited by Congress, has never been waived generally. Therefore, in reviewing suits against the federal government, we must determine initially whether one of the enumerated waivers of sovereign immunity applies. If not, the government is immune from suit and we lack subject matter jurisdiction. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980); *United States v. Sherwood*, 312 U.S. 584, 586-88, 61 S.Ct. 767, 770, 85 L.Ed. 1058 (1941).

In the present case, Interfirst advances three reasons why sovereign immunity does not apply. First, Interfirst contends that its claim falls within the scope, express or implied, of 26 U.S.C. § 7426, which waives immunity in suits by third-party creditors claiming an interest in property that has been wrongfully levied by the IRS. Second, Interfirst argues the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2674. Finally, Interfirst asserts that the doctrine of sovereign immunity, as it relates to this case, is irrational and should be waived on constitutional grounds. We disagree with all three of these arguments and therefore affirm the district court's dismissal.

A

Section 110(a) of the Federal Tax Lien Act of 1966, Pub.L. No. 89-719, 80 Stat. 1142 (codified at 26 U.S.C. §

[6] *See, e.g., Malone v. Bowdoin*, 369 U.S. 643, 652, 82 S.Ct. 980, 986, 8 L.Ed.2d 168 (1962) (Douglas, J., dissenting) (doctrine "more and more out of date"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949) ("may be substance" in the viewpoint that sovereign immunity an "archaic hangover not consonant with modern morality").

[7] *See, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983); *Lehman v. Nakshian*, 453 U.S. 156, 160-61, 101 S.Ct. 2698, 2701, 69 L.Ed.2d 548 (1981).

7426(a)(a)), provides in pertinent part:

> If a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

Prior to the enactment of this statute, a person claiming an interest in property that was levied upon to satisfy the tax liability of another person had no direct cause of action against the government. 26 U.S.C. § 7426 remedies this situation by allowing creditors to bring actions challenging the lawfulness of governmental levies made against property in which they claim an interest. Interfirst argues that this waiver of sovereign immunity applies in the present case on the ground that the IRS made a levy upon Condor's accounts receivable.[8]

Clearly, the IRS did make a levy upon the proceeds of the February 11 auction of Condor's drilling equipment; it even filed a specific "Notice of Levy" upon the auctioneers to compel payment. For this reason, the court below properly severed Interfirst's claim for the proceeds of the auction, and permitted suit against the government based on this claim. *See supra* note 2. The question before us now is whether Section 7426 also applies to Interfirst's claim regarding Condor's accounts receivable. In contrast to the collection by the IRS of the auction proceeds, the IRS filed

[8] Interfirst claims, on the basis of *Slodov. v. United States*, 436 U.S. 238, 256-58, 98 S.Ct. 1778, 1790, 56 L.Ed.2d 251 (1978), that its interest in the accounts receivable was superior to the government's and that the government's levy was therefore wrongful. Because we affirm the district court's holding that the government is immune from suit, we express no opinion on the merits of Interfirst's case.

no "notice of levy" on Condor to collect the accounts receivable. Although the IRS agent did threaten to impose tax liens on Condor if Condor did not deliver the accounts receivable, ultimately Condor surrendered these accounts voluntarily, without any judicial compulsion.

[4] In order for Section 7426 to apply, the IRS must have made an actual "levy" upon the property in question; a threatened levy is insufficient. This is clearly indicated by the legislative history of Section 7426, *see* H.R.Rep. No. 1884, 89th Cong., 2d Sess. 75 (1966-2 Cum.Bull. 869) ("[I]n no case may [an] action be brought prior to the time that the Secretary of the Treasury or his delegate has in fact levied upon the property."), and the courts have so held, *e.g., Nickerson v.United States*, 513 F.2d 31, 33 (1st Cir. 1975); *Hamilton National Bank v. United States*, 367 F.Supp. 1110, 1112-13 (E.D.Tenn. 1972), *aff'd mem.*, 486 F.2d 1405 (6th Cir. 1973); *American Pacific Investment Corp. v. Nash*, 342 F.Supp. 797, 799 (D.N.J. 1972). The question thus is whether the IRS's collection activities constituted a constructive levy.

[5, 6] A "levy" is defined in 26 U.S.C. § 633(b) as "the power of distraint and seizure by any means" — a definition which connotes compulsion. *See also Black's Law Dictionary* 816 (5th ed. 1979) ("*Levy.* A seizure. The obtaining of money by legal process through seizure and sale of property."). This is confirmed by the structure of Section 6331 as a whole, which distinguishes between assessment and demand on the one hand and a levy on the other. Under Section 6331, the IRS must first give notice and demand to a taxpayer and may levy upon his property only if the taxpayer neglects or refuses to pay his taxes within ten days. 26 U.S.C. § 6331(a). This distinction would make little sense if assessment, demand, and volun-

tary payment were tantamount to a levy. It clearly contemplates that a levy is a forcible means of extracting taxes from a recalcitrant taxpayer.[9] Consequently, no levy occurred here, where Condor transferred its accounts receivable to the IRS voluntarily. *See Hamilton National Bank*, 367 F.Supp. at 1113 (holding on similar facts that no levy occurred). *But cf. United Pacific Insurance Co. v. United States*, 320 F.Supp. 450, 451 (D.Or. 1970) (holding that notice of lien equivalent to notice of levy).

[7] In an effort to blunt Section 6331's definition of levy, Interfirst points to the language in Section 7426(a)(1) stating that an action may be brought "without regard to whether such property has been *surrendered to* or sold by" the IRS. (Emphasis added). Interfirst argues that since a "surrender" is a voluntary act, Section 7426 embraces voluntary as well as forced tax payments. We disagree. As many a general is painfully aware, surrenders are not always voluntary. While a "surrender" may be a voluntary act, it may also be compelled. *See Oxford English Dictionary* 3176 (comp. ed. 1971) (defining surrender as "to yield on demand or *compulsion*") (emphasis added). Therefore, the presence of the word "surrender" in Section 7426 does not denote that the section necessarily applies to voluntary tax payments. Indeed, if Interfirst were correct

[9] The district court, in holding that a levy did not occur, appears to have relied on the fact that the IRS never filed a "notice of levy." *See* Memorandum Opinion at 4-5 (following *Standard Acceptance Co. v. United States*, 342 F.Supp. 45, 47-48 (N.D. Ill. 1972)). We do not believe that any documentary requirement must be met before a "levy" can occur within the meaning of § 7426. As the IRS admits, any forced taking of property — whether by means of a notice of levy or by means of an actual seizure — falls within the scope of § 7426. While the IRS is legally obligated to give the taxpayer notice and an opportunity to refuse to pay before levying upon his property, *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 622 n. 7, 96 S.Ct. 1062, 1068 n. 7, 47 L.Ed.2d 568, 569 (9th Cir. 1981); 26 U.S.C. § 6331(a), the IRS's failue to meet this statutory prerequisite should not be a means of avoiding suit by aggrieved third parties under § 7426.

and Section 7426 were meant to apply to voluntary as well as involuntary tax payments, then one would expect that Congress would have referred to the IRS's tax collection activities generally rather than to levies in particular.

[8] Of course, Condor's surrender of its accounts receivable was not entirely voluntary. It is safe to say that, in its heart of hearts, if Condor had pitched a penny into the well, this is not what it would have wished for. In fact, Condor decided to surrender its accounts receivable only after the IRS had threatened to file tax liens. We do not consider this form of emotional compulsion, however, to be the type of compulsion that is involved in a levy. If we did, then most tax payments would be levies, since few taxpayers pay taxes purely as an act of free choice; they pay because of the implicit threat of audits, tax liens, and other legal sanctions.

No bright line separates voluntary from involuntary actions. Instead, the two shade into one another along a spectrum. At one extreme is the "ideal type" of unconstrained, purely voluntary action. At the other is coerced action. Between is the range of partly voluntary, partly involuntary action. To determine where an action fits on this spectrum, we must compare it with other related actions.

Here, in the spectrum of government tax-collection activities, Condor's payment was voluntary. It can hardly be said that the government made Condor an offer it couldn't refuse. The government merely threatened to file a tax lien. While the government rarely holds the taxpayer's arm behind his back or holds a gun to his head, it does have more persuasive means at its disposal for collecting taxes than threatening to file a tax lien. The threat of a tax lien, implicit in every IRS request for payment, does not

distinguish this case from the run of the mill tax-collection case. By threatening to file tax liens, the IRS indicated that forcible steps would be taken if Condor did not voluntarily surrender its accounts. Because Condor responded to the IRS's demand, however, the IRS never had to resort to these steps. The threat was merely a "pre-levy" tactic; it did not transform Condor's voluntary payment into a levy. *See In re Carlson*, 580 F.2d 1365, 1367-68 (10th Cir. 1978) (distinguishing between "pre-levy administrative processes," including demands for payment, and "forced collections" by means of levies); *Nickerson*, 513 F.2d at 33 (distinghishing between actual and threatened levies). Consequently, Section 7426 does not apply.

[9-11] Our conclusion that Interfirst's suit does not fall within the compass of Section 7426 is buttressed by the principle that waivers of sovereign immunity must be strictly construed. *Nickerson*, 513 F.2d at 33 (Section 7426 should be strictly construed). *See generally Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983); *Soriano v. United States*, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957); *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 771, 85 L.Ed. 1058 (1941); *cf. Atascadero State Hospital v. Scanlon*, ____ U.S. ____, ____, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985) (Eleventh Amendment waivers of state immunity must be unequivocal). As Chief Justice Taft stated long ago, "The sovereignty of the United States raises a presumption against its suitability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires." *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927). Even if there were some doubt as to the ambit of Section 7426, we would err in favor of preserving the

government's immunity.[10] Since Section 7426 does not expressly permit suits such as Interfirst's, where the taxpayer voluntarily surrendered its property to the IRS, this section does not waive the government's immunity in the present case.

B

[12] Interfirst claims in the alternative that its suit is permitted under the Federal Tort Claim Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2674, which waives the federal government's liability in tort. Interfirst argues that because it has asserted a tort claim against the IRS for common law conversion, the FTCA's waiver of immunity is applicable in the present case.[11]

In order to sustain this argument, Interfirst must first overcome a formidable obstacle, namely, 28 U.S.C. § 2680(c), which exempts from the provisions of the FTCA "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty . . ." On its face, this exception would seem to apply because Interfirst's claim clearly arises "in respect of" the tax collection efforts of the IRS. The governmental action complained of is the

[10] For this same reason, Interfirst's related argument that we should infer a waiver of immunity under Section 7426 must be rejected. The Supreme Court has often held that waivers of sovereign immunity must be "unequivocally expressed" and must not be inferred. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 2701-02, 69 L.Ed.2d 548 (1981); *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1080); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). This is true even where the plaintiff is an innocent third party, with no alternative remedy. *See Murray v. United States*, 686 F.2d 1320, 1325 (8th Cir. 1982), *cert. denied*, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983).

[11] The IRS argues on appeal that Interfirst is barred from bringing this suit under the FTCA since it failed to file an administrative claim pursuant to 28 U.S.C. § 2675. However,this argument is untimely since it was not raised below. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1117 n. 20 (5th Cir. 1985).

collection by the IRS of Condor's taxes through the acceptance of the Post accounts receivable.

Interfirst advances two arguments why this exemption nevertheless does not apply. First, it claims that Congress intended Section 2680(c) to bar only those suits for which adequate remedies were already available. Since, given our interpretation of 26 U.S.C. § 7426, no other remedy is available to Interfirst, the Bank argues that applying Section 2680(c) would be contrary to Congress's intent. Second, Interfirst claims that Section 2680(c) bars suit only by taxpayers, not by third parties such as itself who are affected by the government's tax collection activities.[12]

[13, 14] We find both of these arguments to be without merit. In interpreting a statute, it is well established that the plain meaning of the language controls, "[a]bsent a clearly expressed legislative intention to the contrary." *Escondido Mutual Water Co. v. La Jolla Indians*, ____ U.S. ____, ____, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983)); *see also Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1282 (5th Cir. 1985). Here, the language of Section 2680(c), insofar as it pertains to this suit, is unambiguous. It exempts from the provisions of the FTCA "[*a*]*ny* claim arising in respect of the assessment or collection of *any*

[12] These two arguments are related in that, for taxpayers, an alternative remedy exists to recover improperly collected taxes. Under 28 U.S.C. § 1346(a)(1), a taxpayer can bring suit against the government "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . ." Third parties, in contrast, are limited to challenging the tax collection activities of the IRS under 26 U.S.C. § 7426, which, as discussed above, applies only where the IRS has levied upon the property in question. Thus, limiting 28 U.S.C. § 2680(c) to suits where an alternative remedy exists would be largely equivalent to limiting it to suits by taxpayers, not third parties.

tax . . ." (Emphasis added.) It gives no indication whatsoever that the exemption is limited to claims where an adequate, alternative remedy is available or to claims brought by taxpayers as opposed to third parties. Instead, it specifically applies to *all* tax-related claims.[13] *See Broadway Open Air Theatre v. United States*, 208 F.2d 257, 259 (4th Cir. 1953).

Given the clear language of the statute, Interfirst has a heavy burden of proving that Congress did not mean what it said — that, despite the broad language used, Congress intended Section 2680(c) to have only limited applicability. Interfirst presents no such evidence. It relies solely on two sources. One is a footnote in *Kosak v. United States*, ____ U.S. ____, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), which states,

> To our knowledge, the only arguably relevant specific statement as to the purpose of § 2680(c) appears in the testimony of Alexander Holtzoff before a subcommittee of the Senate Judiciary Committee. Holtzoff emphasized the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes.

Id. at ____ n. 17, 104 S.Ct. at 1526 n. 17. The other is an article published contemporaneously with the enactment of the FTCA, which emphasizes the existence of adequate, alternative remedies as the basis for Section 2680(c). Gott-

[13] We do not regard *South Carolina v. Regan*, 465 U.S. 367, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984), as contradictory. In *Regan*, the Supreme Court held that the Anti-Injunction Act, 26 U.S.C. § 7421(a), was not intended to bar an action where Congress has not provided an adequate, alternative remedy. 465 U.S. at ____, 104 S.Ct. at 1111-14. This conclusion, although contrary to the apparent meaning of the provision's language, depended on a careful analysis of the legislative history of § 7421(a), and is not transferable to 28 U.S.C. § 2680(c). Indeed, subsequent to *Regan*, the Supreme Court held in *Kosak v. United States*, ____ U.S. ____, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) that § 2680(c) barred the plaintiff's suit despite the lack of an equally effective alternative remedy. *Id.* at ____, 104 S.Ct. at 1527-28.

lieb, *The Federal Tort Claim Act — A Statutory Interpretation*, 35 Geo.L.J. 1, 45 (1946). Neither of these sources indicates that Congress intended Section 2680(c) to apply only to claims for which an adequate, alternative remedy existed; they indicate only that the existence of adequate remedies was one factor leading to the adoption of the exemption. Moreover, in *Kosak*, the principal case relied on by Interfirst, the Court ultimately interpreted Section 2680(c) in a manner that it recognized would leave many persons without an "effectual remedy." ____ U.C. ____, 104 S.Ct. at 1528. The Court, while acknowledging the inequity of denying the plaintiff an effectual remedy, stated that this contention "is properly addressed to Congress, not to this Court." *Id; see also Murray v. United States*, 686 F.2d 1320, 1325 (8th Cir. 1982) (holding that courts should not imply a waiver of sovereign immunity simply because an adequate, alternative remedy does not exist), *cert. denied*, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983).

[15] In our view, Interfirst's suggested interpretation of Section 2680(c) not only ignores the plain meaning of the words; it also offers too narrow a construction of Congress's intent in enacting the exemption. Section 2680(c) is not merely a bookkeeping device to avoid the confusion of overlapping remedies. Instead, as we stated in *Capozzoli v. Tracey*, 663 F.2d 654 (5th Cir. 1981), it reflects "the government's strong interest in protecting the administration of its tax system from the burden of constant litigation." *Id.* at 657; *see also Kosak*, ____ U.S. at ____, 104 S.Ct. at 1526 (one of Congress's principal purposes in creating exemptions to the FTCA was to remove the threat of damage suits); *Dalehite v. United States*, 346 U.S. 15, 27-28, 32, 73 S.Ct. 956, 964, 966, 97 L.Ed. 1427 (1953) (in

enacting the FTCA, Congress did not intend to subject the government to liability for acts of a governmental nature or function). This interest would clearly be frustrated were we to limit Section 2680(c) to suits by taxpayers or where an alternative remedy exists.

Finally, with specific regard to Interfirst's argument that Section 2680(c) bars suit only by taxpayers, not by third parties, we note that this argument has been uniformly rejected by the courts. *See Murray*, 686 F.2d at 1324 (exception in Section 2680(c) barred suit by mortgagee where taxpayer was mortgagor); *United States v. Worley*, 213 F.2d 509, 512 (6th Cir. 1954) (exception barred suit by taxpayer's wife), *cert. denied*, 348 U.S. 917, 75 S.Ct. 301, 99 L.Ed. 719 (1955); *Broadway Open Air Theatre*, 208 F.2d at 259 (exception barred suit by preferred stockholders where taxpayers were principal officers, directors, and common stockholders of corporation); *Home Indemnity Co. v. Brennan*, 430 F.Supp. 828, 831 (S.D.N.Y. 1977) (exception barred suit by contractor's surety where taxpayer was contractor).[14]

[16] For these reasons, we hold that Interfirst cannot bring this suit under the FTCA.

C

Finally, Interfirst urges that if we interpret Section 7426 to apply not to voluntary surrenders of property but only to forced surrenders of property, (i.e., to levies), then the statutory scheme is irrational and violates Interfirst's

[14] Adopting Interfirst's view would not only ignore the plain meaning of § 2680(c), but would render 26 U.S.C. § 7426 superfluous, since aggrieved third-party creditors would be able to bring tort claims directly under the FTCA rather than needing to allege a wrongful levy. *Cf. Home Indemnity*, 430 F.Supp. at 831 n. 5 (Congress enacted 26 U.S.C. § 7426 on the belief that third parties did not have adequate remedies at the time).

substantive due process rights. On this basis, Interfirst argues that we should infer a constitutional cause of action against the government along the lines developed in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[17] The exact nature of Interfirst's claim is somewhat unclear. Although Interfirst speaks of inferring a constitutional cause of action and relies on implied-right-of-action cases, Interfirst does not appear to claim that the IRS violated Interfirst's constitutional rights by accepting Condor's accounts receivable. Instead, Interfirst's cause of action against the IRS is for common law conversion and wrongful levy. Moreover, even if Interfirst were arguing that it did have an implied constitutional cause of action against the government, this would not overcome the government's sovereign immunity. While some commentators have argued that sovereign immunity should not apply to bar constitutional torts, *see, e.g.*, Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv.L.Rev. 1532, 1556-58 (1972), we have rejected this view. As we stated in *Garcia v. United States*, 666 F.2d 960 (5th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982), "The Constitution does not waive the Government's sovereign immunity in a suit for damages . . . [S]uit[s] for damages against the United States based on the Constitution [are] not contemplated by *Bivens* and its progeny." *Id.* at 966; *accord American Association of Commodity Traders v. Department of Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979); *Jaffee v. United States*, 592 F.2d 712, 717-18 (3d Cir.), *cert. denied*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976); *cf. United States v. Testan*, 424

U.S. 392, 401-02, 96 S.Ct. 948, 955, 47 L.Ed.2d 114 (1976) ([T]he basis of the federal claim — whether it be the Constitution, a statute, or a regulation — does not create a cause of action for money damages unless . . . that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'").

Additionally, Interfirst argues that the statutory scheme relating to sovereign immunity is irrational and hence unconstitutional. On this theory, the question is not whether we can infer a cause of action, but rather whether we can infer a waiver of immunity. Or, put in constitutional terms, the question is not whether the IRS violated the Constitution by accepting Condor's accounts receivable, but whether the sovereign immunity doctrine, as applied in this case, is unconstitutional.

Interfirst makes both a specific and a general argument regarding the unconstitutionality of sovereign immunity. Specifically, Interfirst argues that the statutory scheme involved in this case is irrational, since it permits suits by taxpayers, 28 U.S.C. § 1346(a)(1), and by secured creditors whose collateral is involuntarily converted by means of a levy, 26 U.S.C. § 7426, but not by creditors whose collateral is voluntarily surrendered to the IRS by the delinquent taxpayer, 28 U.S.C. § 2680(c). Relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-36, 102 S.Ct. 1148, 1157-58, 71 L.Ed.2d 265 (1982), and *Martinez v. California*, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980), Interfirst contends that if the federal government limits its tort liability in a wholly arbitrary and irrational manner, then it violates the Due Process Clause of the Fifth Amendment.

[18] Interfirst's argument raises a number of intriguing issues, among them, whether Interfirst's interest in bringing suit against the government is a form of "property" protected by the Due Process Clause,[15] and, if so, whether an irrational waiver of sovereign immunity should be struck down altogether (in which case the government's underlying immunity would revive), or whether such a waiver should be judicially modified so as not to be irrational. Interfirst cites no cases, nor are we aware of any, where a congressional waiver of sovereign immunity has been held to be irrational and, on that basis, has been broadened. We note that such a result would be in tension, if not in direct conflict, with the fundamental principle that waivers of sovereign immunity must be expressly stated by Congress and should not be inferred. *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 2701, 69 L.Ed.2d 548 (1981); *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct.1501, 1503, 23 L.Ed.2d 52 (1969); *see also Soriano v. United States*, 352 U.S. 270, 276-77, 77 S.Ct. 269, 273-74, 1 L.Ed.2d 306 (1957); *cf. Atascadero State Hospital v. Scanlon*, ____ U.S. ____, ____, 105 S.Ct. 3142, 3146, 87 L.Ed.2d 171 (1985) (waivers of state immunity under the Eleventh Amendment must be

[15] Although the Supreme Court held in *Logan* that the plaintiff's cause of action was a species of property protected by the Due Process Clause of the Fourteenth Amendment, 455 U.S. at 428-29, 102 S.Ct. at 1154, that determination depended on an analysis of state law, and is not necessarily applicable here, where the plaintiff's action is barred not by an irrational procedural requirement, as in *Logan*, but by the doctrine of sovereign immunity. Arguably, individuals do not have a property interest in being able to sue the United States, given the fact that, presumptively, individuals cannot sue the government for damages; they can only bring suit if Congress has expressly waived the government's immunity. It is difficult to see how a congressional waiver of sovereign immunity could arbitrarily deprive a plaintiff of property, since, but for that waiver, the plaintiff would have had no right to sue the government at all.

expressly stated).

[19] In the present case, however, we need not resolve these questions. Even if we have the power both to review the rationality of congressional waivers of sovereign immunity and to expand these waivers in order to make them rational, we find that the waivers in question here are rational. In 26 U.S.C. § 7426 and 28 U.S.C. § 2680(c), Congress chose to distinguish between forcible and voluntary collection activities by the IRS. Congress waived sovereign immunity in the limited number of cases where the Government has forcibly levied upon property claimed by a third-party creditor, but did not waive immunity for the vast bulk of cases arising out of the government's voluntary tax collection activities. We do not find anything irrational in this distinction, and therefore reject Interfirst's argument.

More generally, Interfirst contends at length that the doctrine of sovereign immunity, as a whole, is irrational and should be limited by the courts to the greatest extent possible. It invites us to enter into a "dialogue" with Congress by inferring a waiver of sovereign immunity in the present case. *Brief for Appellants* at 47 (quoting Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 Harv.L.Rev. 1, 29 (1975)). Interfirst's argument, while forceful, is addressed to the wrong audience. The Supreme Court has repeatedly upheld the doctrine of sovereign immunity, and has held equally often that waivers of sovereign immunity must be "unequivocally expressed," *e.g.*, *Lehman*, 453 U.S. at 161, 101 S.Ct. at 2701; *Mitchell*, 445 U.S. at 538, 100 S.Ct. at 1351; *King*, 395 U.S. at 4, 89 S.Ct. at 1503, even if the application of sovereign immunity results in hardship, *Soriano*, 352 U.S. at 277, 77 S.Ct. at 274. As the Court

stated in *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), "We are not ready to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened government policy." *Id.* at 400, 96 S.Ct. at 954. Since the Supreme Court has declined to enter into a "dialogue" with Congress concerning sovereign immunity, it is not our place to do so. While we appreciate Interfirst's thorough and interesting discussion of the history of sovereign immunity, we can only respond: Ours not to reason why, ours but to do or die.[16]

III

We recognize that Interfirst is an innocent third party. This is true of many individuals who are injured by the government but who are nevertheless denied relief. The doctrine of sovereign immunity bars suit by the innocent and the guilty alike. The doctrine is often harsh and makes little sense in cases like the one before us here. But it remains the law.

No. 84-1412, APPEAL DISMISSED.

No. 84-1571, AFFIRMED.

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[16] A. Tennyson, *The Charge of the Light Brigade* stanza 2 (1854) ("Theirs not to make reply,/ Theirs not to reason why,/ Theirs but to do and die.").

APPENDIX B

§7426. Civil actions by persons other than taxpayers

(a) Actions permitted

(1) Wrongful levy

If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a distict court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceed

If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds

If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(b) Adjudication

The district court shall have jurisdiction to grant only

such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction

If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the courts may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property

If the court determines that such property has been wrongfully levied upon, the court may —

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of —

(i) the amount received by the United States from the sale of such property, or

(ii) the fair market value of such property immediately before the levy.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) Surplus proceeds

If the court determines that the interest or lien of any

party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds

If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) Validity of assessment

For purposes of an adjudication under this section, the assessment of tax upon which the interet or lien of the United States is based shall be conclusively presumed to be valid.

(d) Limitation on rights of action

No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) Substitution of United States as party

If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer of employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on

the United States.

(f) Provision inapplicable

The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest

Interest shall be allowed at an annual rate established under section 6621 —

(1) In the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied to the date of payment of such judgment.

(h) Cross reference

For period of limitation, see section 6532(c).

§ 6331. Levy and distraint.

(a) Authority of Secretary or delegate. — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instru-

mentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property — The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures — Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy —

(1) In general — Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 10-day requirement — The notice required under paragraph (1) shall be —

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

no less than 10 days before the day of the levy.

(3) Jeopardy — Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(e) Continuing levy on salary and wages —

(1) Effect of levy — The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time.

(2) Release and notice of release — With respect to a levy described in paragraph (1), the Secretary shall promptly release the levy when the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, and shall promptly notify the person upon whom such levy was made that such levy has been released.

(f) Cross references —

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

§ 2674 Liability of United States

The United States shall be liable, respecting the provi-

sions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If however, in any case wherein death was caused, the law of the place where the act or omission complained or occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any

employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Supreme Court, U.S.
FILED
FEB 28 1986
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CLERK

No. 85-902 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERFIRST BANK DALLAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's suit to recover from the United States the proceeds of property voluntarily surrendered by a taxpayer to the IRS in response to an IRS demand for payment of an assessed tax is barred by the doctrine of sovereign immunity, inasmuch as Congress has not enacted any statute consenting to such a suit.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 769 F.2d 299. The opinion of the district court (R. 275-280) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1985. The petition for a writ of certiorari was filed on November 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The facts alleged by petitioner, which were accepted as true by the courts below for purposes of ruling on the government's motion to dismiss (Pet. App. A2 n.1), may be summarized as follows. In April 1981, petitioner agreed to lend $9 million to the Condor Holding Company and its

subsidiaries (the Condor Group). The loan was secured inter alia by the equipment and accounts receivable of Condor Drilling Company (Condor), a member of the Condor Group. This security interest was allegedly perfected by petitioner's filing of financing statements with the Texas Secretary of State. In December 1981, the Condor Group defaulted on its initial payment of principal and interest. Petitioner gave notice of default on January 29, 1982. On the same day, the IRS assessed unpaid employment and withholding taxes against Condor in the amount of $769,868. Pet. App. A1-A2.

On February 11, 1982, Condor's drilling equipment was liquidated at auction. Immediately after the auction, the IRS levied on the auction proceeds by serving a "Notice of Levy" on the auctioneers. The auctioneers surrendered the auction proceeds to the IRS in response to the levy. Pet. App. A2.

Sometime prior to March 1, 1982, the IRS sent a "Demand for Payment of Assessed Tax" to Condor, requesting that Condor surrender its accounts receivable in partial satisfaction of its tax liability. The IRS said that it would file notices of federal tax lien against Condor's assets if the accounts receivable were not surrendered. In response to this request, Condor, on March 1 and March 4, 1982, endorsed over to the IRS three cashier's checks from Post Petroleum Company in the total amount of $240,000 (Pet. App. A2). Although Condor had previously received notice from petitioner that petitioner intended, on or before March 9, 1982, to foreclose on Condor's collateral, including the accounts receivable due from Post Petroleum, Condor did not inform petitioner that it was complying with the IRS's demand for payment. On March 9, 1982, Condor entered bankruptcy proceedings. Petitioner alleges that its claims against Condor exceed the value of Condor's collateral by more than $6 million and that its claims remain unpaid. Pet. App. A3.

2. On November 4, 1982, petitioner commenced this suit against the United States and the IRS in the district court for the Northern District of Texas, claiming damages of $438,466. Petitioner alleged that it had a perfected security interest in Condor's assets, and that its claim had priority over that of the IRS. Of the amount that petitioner claimed, $198,466 represented the sum that the auctioneers had surrendered to the IRS in response to the notice of levy. The district court severed that portion of petitioner's claim from the rest of the suit, and the portion thus severed was eventually settled (Pet. App. A3 & n.2).

The balance of the amount petitioner claimed, or $240,000, represented the Post Petroleum cashier's checks that Condor had endorsed to the IRS. The district court held that petitioner's suit in this respect was barred by sovereign immunity. The court held that petitioner could not sue under Section 7426(a)(1) of the Internal Revenue Code,[1] which authorizes suits against the United States by aggrieved third parties "[i]f a levy has been made on property or property has been sold pursuant to a levy," since the IRS had collected the cashier's checks from Condor without resort to a levy (R. 276-278). The court likewise held that petitioner could not sue under the Federal Tort Claims Act, since that Act specifically excludes from its scope "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). And the court held that, in the absence of a specific statute waiving sovereign immunity, it was without jurisdiction to hear petitioner's due process claims (R. 279-280).

The court of appeals unanimously affirmed (Pet. App. A1-A20). It agreed with the district court that Code Section 7426 did not apply because the IRS's collection activity did

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

not amount to a "levy" (Pet. App. A7-A11). The court of appeals likewise agreed (*id.* at A11-A15) that the Tort Claims Act did not furnish a waiver of sovereign immunity in view of the bar of 28 U.S.C. 2680(c). The court concluded that its construction of Section 7426 did not violate petitioner's substantive due process rights by creating an irrational statutory scheme, and it held that settled authority prevented it from inferring a waiver of sovereign immunity in the absence of a statute explicitly providing for one (Pet. App. A15-A20).

ARGUMENT

The decision below is correct. Petitioner does not allege, nor is there, a conflict among the circuits on the question presented. There is no basis for further review.

1. This Court has long recognized that the United States is absolutely immune from suit save where it has consented to be sued. *E.g., Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821); *Hill* v. *United States*, 50 U.S. (9 How.) 386, 389 (1850); *United States* v. *Sherwood*, 312 U.S. 584, 586-588 (1941); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983). The Court, moreover, has established beyond question that a waiver of sovereign immunity cannot be inferred, but must be unequivocally expressed in an Act of Congress. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Mitchell*, 445 U.S. at 538; *United States* v. *King*, 395 U.S. 1, 4 (1969). The court of appeals correctly rejected the two statutory bases for a waiver of sovereign immunity that petitioner asserted below and reiterates here.

a. Section 7426(a)(1) of the Code provides that "[i]f a levy has been made on property or property has been sold pursuant to a levy," an aggrieved third party—that is, a

person "other than the person against whom [the tax] is assessed"—may bring a "wrongful levy" action against the United States in federal district court. The legislative history makes it clear that "in no case may [an] action be brought [under Section 7426] prior to the time that the [IRS] has *in fact levied* upon the property." H.R. Rep. 1884, 89th Cong., 2d Sess. 75 (1966) (emphasis added). Consistently with this legislative history, the courts have repeatedly held that an actual levy, and not just the possibility or threat of one, is required to bring Section 7426 into play. See *Nickerson* v. *United States*, 513 F.2d 31, 33 (1st Cir. 1975); *Hamilton Nat'l Bank* v. *United States*, 367 F. Supp. 1110, 1112-1113 (E.D. Tenn. 1972), aff'd per curiam, 486 F.2d 1405 (6th Cir. 1973); *American Pac. Inv. Corp.* v. *Nash*, 342 F. Supp. 797, 799 (D.N.J. 1972).

A "levy" is defined in Section 6331(b) to include "the power of distraint and seizure by any means." As the court of appeals correctly observed, this definition "connotes compulsion" (Pet. App. A7). A "levy," in other words, encompasses only an *enforced* collection by the IRS, either by service of a formal notice of levy or by actual seizure. A "levy" does not include a taxpayer's voluntary compliance with an IRS demand for payment, as occurred here.[2]

This interpretation of the statutory language is confirmed by the statutory scheme. Section 6331(a) provides that "it shall be lawful for the Secretary to collect [a] tax * * * by levy" if the person liable to pay the tax "neglects or refuses

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[2]During Congress's consideration of Section 7426, the American Bar Association proposed a statute which, had it been adopted, would have waived sovereign immunity if a levy were threatened or if property were delivered to the IRS, with or without a levy, by a person having no right to do so. See *Priority of Federal Tax Liens and Levies: Hearings Before the House Comm. on Ways and Means*, 89th Cong., 2d Sess. 159 (1966). That this proposal was not adopted further demonstrates that Congress did not intend Section 7426 to apply in the circumstances of this case.

to pay the same within 10 days after notice *and demand*" (emphasis added). Since demand by the Commissioner and nonpayment by the taxpayer are prerequisites to a lawful levy, a taxpayer's payment following the Commissioner's demand, without more, cannot be a "levy" within the meaning of the statute.

Contrary to petitioner's assertion (Pet. 8), it is of no consequence in determining the application of Section 7426 that the Commissioner's demand for payment was allegedly coupled here with a "threat" that notices of tax lien would be filed if payment were not forthcoming. As the court of appeals observed (Pet. App. A9-A10), such a threat is implicit in every demand for payment, since the federal tax lien arises automatically when "any person liable to pay any tax neglects or refuses to pay the same after demand" (I.R.C. § 6321). The government's filing of notice of its tax lien simply determines the priority of its claim (I.R.C. § 6323(a)) and does not, in and of itself, constitute a "levy" (I.R.C. § 6331).

Simply stated, the IRS in this case had no need to resort to a levy on the cashier's checks because Condor voluntarily tendered them in response to the Commissioner's demand for payment. Condor's payment differed in no substantial respect from any taxpayer's voluntary payment of his tax bill. It did not implicate "a levy" in any sense of the word.[3]

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[3]There is plainly no merit to petitioner's contention (Pet. 11-16) that Section 7426, as construed by the court of appeals, violates "substantive due process" (Pet. 12) by creating an arbitrary classification between voluntary and enforced tax collection activities. It is well established that classifications adopted by Congress in a tax statute are constitutionally valid as long as they bear a rational relationship to a legitimate governmental purpose. See, *e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983). There was nothing irrational about Congress's decision to limit its waiver of sovereign immunity in Section 7426 to those situations where the IRS has effected collection of an assessed tax by means of a levy or seizure, as opposed to the situation

b. It is equally apparent that the Tort Claims Act fails to provide the requisite waiver of sovereign immunity. That Act by its terms withholds the government's consent to be sued as to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). Here, the very act of which petitioner complains is the IRS's collection of Condor's taxes by making a demand for, and accepting by way of payment, the Post Petroleum receivables. Petitioner's assertion that Congress intended Section 2680(c) "to bar only those suits involving the assessment or collection of taxes for which other adequate remedies were available" (Pet. 9) flies in the face of the statute's plain language and has been rejected by the courts. See, *e.g.*, *Murray* v. *United States*, 686 F.2d 1320 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983).

Indeed, in *Kosak* v. *United States*, 465 U.S. 848 (1984), this Court expressly rejected the contention that Section 2680(c) should be construed so as to avoid denying a complainant an effectual remedy, stating that such a contention "is properly addressed to Congress, not to this Court" (465 U.S. at 862). Petitioner's proposed construction of Section 2680(c), as the court of appeals pointed out (Pet. App. A14-A15), would render Section 7426 of the Code largely superfluous. And petitioner's proposed construction ignores Section 2680(c)'s central purpose, which is to further " 'the

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where (as here) the IRS receives payment voluntarily from a taxpayer. Indeed, on petitioner's construction of Section 7426, *any* voluntary payment by a taxpayer, tendered in consequence either of a self-assessment on his tax return or a deficiency assessment after an audit, would expose the goverment to suit by third parties asserting that they should have been paid first. Congress plainly acted rationally in declining to waive sovereign immunity to such an infinitude of potential lawsuits, and in limiting its waiver of sovereign immunity to those situations where the IRS coerces payment by means of levy, seizure or judicial process.

government's strong interest in protecting the administration of its tax system from the burden of constant litigation.' " Pet. App. A14 (quoting *Capozzoli* v. *Tracey*, 663 F.2d 654, 657 (5th Cir. 1981)).[4]

2. Petitioner's final contention (Pet. 18-22) is that, even if Congress has not expressly waived sovereign immunity by statute, a waiver must be implied in the case of what petitioner describes as a constitutional tort action "arising directly under the Due Process Clause of the Constitution" (*id.* at 18). But even if one were to assume the applicability of such a cause of action in the instant circumstances, the fundamental rule that waivers of sovereign immunity must be unequivocally expressed in an Act of Congress applies with equal force to claims predicated on the Constitution. *Garcia* v. *United States*, 666 F.2d 960 (5th Cir.), cert. denied, 459 U.S. 832 (1982); *American Ass'n of Commodity Traders* v. *Department of Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979). This Court recently denied certiorari in a case presenting a contention substantially identical to that which petitioner makes here. *Arnsberg* v. *United States*, 757 F.2d 971 (9th Cir. 1985), cert. denied, No. 85-596 (Feb. 24, 1986).

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[4]Petitioner's reliance (Pet. 10) on *South Carolina* v. *Regan*, 465 U.S. 367 (1984), is misplaced. That case involved the applicability of the Anti-Injunction Act (I.R.C. § 7421) to a suit brought by a state seeking to invoke the Court's original jurisdiction. The Court's holding that Section 7421 did not bar the state's suit was based upon the Court's conclusion that "the Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress did not intend [it] to apply to actions brought by aggrieved parties for whom [Congress had] not provided an alternative remedy" (465 U.S. at 378 (footnote omitted)). That conclusion, based as it was on the legislative history of the Anti-Injunction Act, obviously has no application to the Tort Claims Act, as is apparent from the Court's subsequent decision in *Kosak*.

Contrary to petitioner's statement (Pet. 18-19), moreover, this Court's decisions permitting the maintenance of damages suits against government employees as individuals (*e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979)), furnish no support for the notion that waivers of sovereign immunity may be implied where not expressed. Indeed, it is precisely because sovereign immunity precludes the maintenance of such suits against the government itself that they are brought against its employees in their individual capacities. Petitioner's argument at bottom amounts to a request (see Pet. 19-22) that this Court abolish the doctrine of sovereign immunity, something that the Court over the course of two centuries has refused to do.

As the court of appeals observed (Pet. App. A20), the invocation of the doctrine of sovereign immunity to bar suit by "an innocent third party" like petitioner will almost invariably seem harsh. Barred from suit against the government, petitioner will be remitted to pursuing its claims against Condor in bankruptcy court, where, petitioner alleges, it has but a slim chance of being made whole. But this Court has not found the seeming harshness of the doctrine a sufficient justification "to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." *United States* v. *Testan*, 424 U.S. 392, 400 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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